84-972

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES BARTON,
Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether prosecutorial misconduct can violate due process even if it does not directly affect the evidence?

2. Whether dismissal is an appropriate remedy for such prosecutorial misconduct?

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Contents	iii
Table of Authorities	iii
Opinion Below	1
Jurisdiction	2
Statement of the Case	2
Reasons for Granting the Writ	11
Conclusion	18
Appendix A	A-1
Appendix B	A-2

TABLE OF AUTHORITIES

Cases:

Betts v. Brady, 316 U.S. 455, 86 L.Ed. 1595 (1942)	11
Kinsella v. U.S., 361 U.S. 234, 4 L.Ed.2d 268 (1960)	11
People v. Cornille, 95 Ill.2d 497, 448 N.E.2d 857, 69 Ill.Dec. 945 (1983)	13, 14
People v. Gilbert, 281 Ill. 619 (1917)	15
Re Gault, 387 U.S. 1, 18 L.Ed.2d 527 (1967)	11
U.S. v. Armijo-Martinez, 669 F.2d 1131 (6th Cir. 1982)	15
U.S. v. Gouveia, 704 F.2d 1116 (9th Cir. 1983)	15

U.S. v. Morrison, 449 U.S. 361, 66 L.Ed. 564, 101 S.Ct. 665 (1981) 14, 15, 16

U.S. v. Stanford, 589 F.2d 285 (7th Cir. 1978) 17

Statutes:

U.S. Const., Amend. V 11

U.S. Const., Amend. XIV 11

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner James Barton prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of Illinois entered on October 2, 1984.

OPINIONS BELOW

On October 2, 1984 the Illinois Supreme Court denied the Petitioner's Petition for Leave to Appeal from the Judgment and Order of the Appellate Court of the Fifth District, State of Illinois, entered on March 1, 1984. The Order of the Illinois Supreme Court is attached as Appendix A hereto, and the Opinion of the Appellate Court of the Fifth District of Illinois is attached as Appendix B hereto.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on October 2, 1984 (Appendix A). This petition was filed within sixty days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

STATEMENT OF THE CASE

On May 11, 1983, the trial court dismissed the charges against the defendant James Barton (C158-166). In its order the court found that the State's Attorney of Madison County had done the following:

1. Publicly and privately vowed to get the defendant, even long before the defendant had been charged (C158).

2. Publicly and constantly stated his opinion of the guilt of the defendant (C158).

3. Publicly commented on the evidence (C160).

4. Disseminated inadmissible evidence to the media and public (C160).

6. Publicly commented on evidence presented to the grand jury (C160).

7. Called for the public to "get worked up against the defendant" (C161).

8. Publicly and repeatedly compared the defendant to a convicted sex offender who had recently gained notoriety (C161).

9. Deprecated and belittled the defendant at a social gathering of approximately three hundred members of the public (C161).

10. Publicly called the defendant's plea of not guilty deceitful; called the defendant a chameleon; and characterized the defendant's Fifth Amendment rights as a hiding place (C161).

11. Publicly accused the defendant's counsel of engaging in trickery (C162).

12. Threatened the defendant's counsel with filing charges against counsel that were not related to the evidence; and publicly characterized the defendant's pleadings as vexatious and without merit (C162).

13. Publicly declared, after an adverse ruling on the Motion to Suppress, that the judge was "not a friend of the prosecution" (C162).

14. Attempted to have the defendant fired (C163).

15. Improperly obtained statements from the defendant; and after such were suppressed, admitted he had been "sneaky", but that it takes "clever police tactics to catch clever criminals" (Deft. Exhibit #1, R186).

After weighing the evidence, considering the need for an independent and forceful prosecutor, and balancing the interest of society against the rights of this particular defendant (C165, 166), the Court further found that:

A. the defendant had been denied due process (C165);

B. the defendant's right to counsel had been seriously impaired (C165);

C. fundamental fairness had been violated (C165); and

D. the defendant proved actual and substantial prejudice, incurable by any other remedy (C166).

These findings and order were based upon live testimony and evidence admitted pursuant to stipulation (Deft. Exhibit #1). The following is a chronological review of the facts presented to the court.

PRE-INDICTMENT

Don Weber was elected the State's Attorney of Madison County on November 4, 1980. On November 7, 1980, the State's Attorney declared that the public wanted "Attilla the Hun" as prosecutor; he also pledged to investigate the defendant (Deft. Exhibit #1).

On March 30, 1981, after a grand jury had failed to charge the defendant, the State's Attorney publicly commented that "there may not be criminal activity, but there might be grounds for dismissal or other disciplinary action" (Deft. Exhibit #1). On May 15, 1981, the State's Attorney released the grand jury report; the report was not an indictment, not a "no true" bill, and not a report on the county buildings. Also in May of 1981, the State's Attorney privately told his office administrator, Marvin Darling, that he (the State's Attorney) would get Barton (the defendant) before he left (R2-5).

On June 21, 1982, the State's Attorney publicly attacked Judge Ferguson in an unrelated case of *People v. Van Hook,* claiming that the State's Attorney would present evidence of the court's unfairness to the prosecution (Deft. Exhibit #1). No evidence was ever presented.

On November 5, 1982, the State's Attorney's office took statements from the defendant, which were later suppressed as violative of the defendant's constitutional rights (C136-143).

On November 12, 1982, "Sources close to the investigations" tipped the media about the grand jury investigation of the defendant (Deft. Exhibit #1). The defendant, on the same day, permitted an interview of himself by a newsman who had learned of this investigation.

On November 16, 1982, the State's Attorney publicly announced he would ask the grand jury to indict the defendant and commented on the grand jury testimony of witness Nichols (Deft. Exhibit #1). On the same day he publicly announced that

no indictment was being sought on witness Greathouse (Deft. Exhibit #1). On November 17th there were further comments from the State's Attorney about the evidence in the case (Deft. Exhibit #1).

POST-INDICTMENT

On November 18, 1982, while discussing the evidence with the media, the State's Attorney said, "This is not an iffy case" (Deft. Exhibit #1). The State's Attorney commented to the press about the testimony of witness Nichols, stated that he was seeking no indictment of witness Greathouse, and announced that the defendant was "never cleared of impropriety" by the 1981 grand jury (Deft. Exhibit #1).

On November 19, 1982, the State's Attorney publicly called the defendant a "corrupt official" (Deft. Exhibit #1).

On November 23, 1982, the defendant stated his innocence in an interview by a newsman.

On November 24, 1982, the extensive investigative reports of the Division of Criminal Investigation were obtained by the media and reported extensively (Deft. Exhibit #1).

On December 1, 1982, the State's Attorney publicly renewed his efforts to get the defendant fired (Deft. Exhibit #1).

On December 2, 1982, the State's Attorney publicly urged that the defendant be "canned." A reporter asked the State's Attorney whether the defendant ought to be considered innocent prior to trial and conviction and was told by the State's Attorney: "People just don't understand the law." On the same day the State's Attorney linked this defendant with another defendant pending trial for indecent liberties with a child. Also on December 2, 1982, a news editorial urged the State's Attorney to:

> weigh his words a bit more judiciously, lest the public begin to compare him with frontier prosecutors who

sometimes favored hanging the suspect and then giving him a fair trial. (Deft. Exhibit #1).

On December 6, 1982, a newspaper acknowledged that the defendant's statements (later suppressed) were included in the discovery materials made available to the press (Deft. Exhibit #1).

On December 16, 1982, the State's Attorney announced his frustration at the defendant not being fired and stated that he would seek additional charges against the defendant in an attempt to oust the defendant from his job (Deft. Exhibit #1). A day later, commenting on the new charge, the State's Attorney said, "I want to make sure that I get him" (Deft. Exhibit #1).

On December 20, 1982, the State's Attorney stated he was not motivated against the defendant by political or personal concerns (Deft. Exhibit #1).

On January 6, 1983, the State's Attorney distributed a packet of discovery materials (Deft. Exhibit #4) to each member of the County Board. This packet contained the inadmissible and selective results of certain polygraph tests administered to certain witnesses (Deft. Exhibit #4). The State's Attorney also announced he was not targeting witness Greathouse for investigation (Deft. Exhibit #1).

On January 17, 1983, the State's Attorney announced he would seek an indictment of witness Greathouse; he further called public attention to the polygraph results of witness Greathouse. On the same day he stated that he was expecting others to try and make him out as the bad guy (Deft. Exhibit #1).

On January 21, 1983, the State's Attorney and foreman of the grand jury convened a press conference "to clear the air." (Deft. Exhibit #1).

On February 18, 1983, the State's Attorney attended a public meeting of approximately one hundred fifty persons. The

meeting had been called by poster notice depicting the defendant with his pants around his ankles (Deft. Exhibit #2). The State's Attorney told the crowd, among other comments, that "the more people we get involved in the Barton investigation, the more we can get them worked up." (C154, 155). The State's Attorney reminded the crowd of his longstanding feelings toward the defendant. He also compared this defendant to a man who had just the day before been convicted of indecent liberties with a child, by saying, "Barton is just like that school teacher Van Hook." (C155). Finally, the State's Attorney told the crowd that his top priorities were now the case of this defendant and that of a defendant charged with a notorious and brutal murder (C155).

On March 8, 1983 an assistant State's Attorney attended a meeting of the executive committee of the County Board, the employer of the defendant, and made the following remarks, referring to the defendant:

1. You have had the advantage of hearing the testimony of an officer who testified under oath to the grand jury...

2. He's a chameleon.

3. He wants his trial, he wants to hide behind the Fifth Amendment, he wants all the advantage he can... (Deft. Exhibit #3).

On March 11, 1983, the State's Attorney renewed his public call for the firing of the defendant.

On March 12, 1983, the State's Attorney attended, together with approximately three hundred members of the public, a benefit dance in Maryville. During the dance, the State's Attorney made comments over the public address system about certain public officials, recently convicted defendants, and this defendant. The comments were made in the context of a contest conducted by the State's Attorney to determine by crowd ap-

plause which statements made by public officials, recently convicted defendants, and this defendant should receive an award for the "dumbest statement" of the year. The awards included a trophy of the rear end of a horse and a clown award. The State's Attorney then repeated an incriminating statement allegedly made by this defendant to the Division of Criminal Investigation Agents. The State's Attorney then directed an employee of his office to serve as the "applause meter" to register the amount of crowd applause to the statement of this defendant. Various members of the crowd verbally expressed their objection and disapproval to this contest as conducted by the State's Attorney (C156, 157).

On March 17, 1983, the State's Attorney publicly criticized the members of the County Board for not firing the defendant, and he announced that the defendant was his number one priority. Again, he compared the defendant to the man recently convicted of indecent liberties with a child (Deft. Exhibit #1).

The defendant's motion to suppress was heard on March 22, 1983. At the hearing, the court repeatedly admonished the State's Attorney for being impolite in his references to this defendant. The State's Attorney called the defendant a crook and admitted in argument that "the State might have been a little sneaky in what we did", referring to the manner in which he obtained statements from the defendant (R102). The State's Attorney again compared the defendant to the man recently convicted of indecent liberties with a child (R186, R204).

On March 25, 1983, the State's Attorney told the press that the filing of the motion to suppress and the hearing on the motion had been attempts to make him (the State's Attorney) the central issue in the case. He further characterized the motion as:

> a typical defense tactic, to try and attack the prosecutor in the case if they can...that motion and the ones to come are causing people to look at the hole in the doughnut and not the doughnut itself. (Deft. Exhibit #1).

After the court's order of March 29, 1983 suppressing the defendant's statements, the State's Attorney publicly derided the court, compared the defendant to the man recently convicted of indecent liberties with a child, and commented further on the evidence. Regarding the court, the State's Attorney said the following:

> He is not now, nor has he ever been, a friend to the prosecution. Needless to say, he is not my favorite judge. (Deft. Exhibit #1).

He also told the press that he had no apology for his conduct, and declared "it takes clever police tactics to catch clever criminals." (Deft. Exhibit #1).

The State's Attorney renewed these public comments on April 6, 1983, after the defendant filed, on April 5, 1983, an amended motion to dismiss, alleging prosecutorial misconduct (Deft. Exhibit #1).

On April 7, 1983, the State's Attorney publicly stated his opinion that the amended motion to dismiss was insufficient as a matter of law. He denied that his tactics, although "clever", violated any ethical considerations (Deft. Exhibit #1). He stated that he was used to attacks and that criticism is a sign that he had been doing a good job. He further declared:

> It's a good thing virtue is its own reward because it doesn't get much respect from defense attorneys. (Deft. Exhibit #1).

Also on April 7, 1983, a letter from the State's Attorney was hand delivered by an assistant State's Attorney to defendant's counsel (Deft. Exhibit #5). The letter was sealed. The carrier told counsel that the contents were unknown to the carrier, but that they would be filed if the defense proceeded to hearing on its motion to dismiss (C157) (Deft. Exhibit #5). A similar packet was delivered to the court, and remained sealed in the record just before page C150 of the record.

On May 11, 1983, after a hearing, the trial court dismissed the indictment.

The State appealed from the trial court order of dismissal, and on March 1, 1984 the Fifth District Appellate Court reversed. In its opinion, the Appellate Court construed the trial court's finding of a denial of due process to involve only two articulable grounds: prejudicial pretrial publicity generated by the State's Attorney; and, denial of defendant's right to counsel. (Appendix B, p. A-7).

The Appellate Court found ample evidence of potentially adverse publicity, but found such capable of remedy by voir dire, continuance, and change of venue. The court declared the proper remedy for infringement of right to counsel to be the suppression of evidence obtained by such violation. (Appendix B, p. A-9).

The Appellate Court then emphasized that it did not "condone the prosecutor's behavior," and that it found such conduct "wholly unjustified and inappropriate." (Appendix B, p. A-9). The court also described the conduct as, "to say the least, reprehensible." (Appendix B, p. A-9).

Despite these characterizations, the Appellate Court declared that "the interest of the public in the impartial prosecution of alleged crimes dictate that this cause be reversed..." (Appendix B, p. A-9).

On October 2, 1984, the Illinois Supreme Court denied the petitioner's Petition for Leave to Appeal.

REASONS FOR GRANTING THE WRIT

I.

The Conduct By The Prosecutor Violated Due Process Even Though It Did Not Directly Affect The Evidence

The Fifth Amendment of the Federal Constitution and declares that no person shall "be deprived of life, liberty, or property without due process of law." The Fourteenth Amendment of the Federal Constitution declares that no State shall so deprive any person. Due process is concerned with the denial of fundamental fairness; it is the essential term in the social compact which defines the rights of the individual and restricts the powers which the State may exercise; and its asserted denial is to be tested, not as a matter of rule, but rather by an appraisal of the totality of the facts of a particular case. *Kinsella v. U. S.,* 361 U.S. 234, 4 L.Ed.2d 268, 276 (1960); *Re Gault,* 387 U.S. 1, 18 L.Ed.2d 527, 542 (1967); and *Betts v. Brady,* 316 U.S. 455, 86 L.Ed. 1595 (1942).

After examining the totality of facts in this case, the trial court correctly found that the misconduct of the State's Attorney was so pervasive and continuing that it fatally infected the very fundamental fairness of the proceedings. The State had denied this defendant due process by acts of misconduct directed at each participant in the proceedings and every facet of the criminal justice system.

The State's Attorney attacked the defendant, the defense counsel, and the judge. In addition, he publicly stated his opinions of the strength of the evidence; and he publicly pressured a material witness by alternately asserting that he would not indict the witness and that he would indict the witness.

The attacks on the defendant commenced two full years prior to the indictment and continued unabated to the eve of the final hearing. (Defendant's Exhibit No. 1, 11/7/80). These attacks included the following:

1. Public and private vows to get the defendant (R2-5).

2. Repeated attempts to get the defendant fired (Defendant's Exhibit No. 1, 12/1/82, 12/2/82, 12/16/82, 3/17/83).

3. Repeated opinions as to the defendant's guilt (Defendant's Exhibit No. 1, 11/18/82).

4. Incitement of a public crowd against the defendant (Defendant's Exhibit No. 2, C154, 155).

5. Public ridicule of the defendant (Defendant's Exhibit No. 1, 3/12/83).

6. Continual comparison of the defendant with a convicted sex offender and a man awaiting trial for a notorious and brutal murder (Defendant's Exhibit No. 1, 12/2/82, 2/18/83, 3/17/83, 3/29/83).

7. Attempts to substantially impair the defendant's right to counsel (Defendant's Exhibit No. 1, 3/25/83, 4/6/83, 4/7/83, Defendant's Exhibit No. 5).

The State's Attorney publicly attacked defense counsel by characterizing their pleadings as typical defense tactics. He accused them of shifting the focus from the defendant to himself (Defendant's Exhibit No. 1, 3/25/83); and he publicly denounced their pleadings as insufficient "as a matter of law." (Defendant's Exhibit No. 1, 4/7/83). In an effort to defend his own conduct, the State's Attorney declared defense counsel to be opponents of virtue (Defendant's Exhibit No. 1, 4/7/83). Finally, in order to avoid a hearing on his own misconduct, the State's Attorney threatened defense counsel with publishing unfounded allegations of ethical misconduct (Defendant's Exhibit No. 5).

The State's Attorney also attacked the trial judge and the integrity of the court. After the trial judge granted the defendant's motion to suppress, the State's Attorney publicly derided him, saying:

> He is not now, nor has he ever been, a friend of the prosecution. Needless to say, he is not my favorite judge. (Defendant's Exhibit No. 1, 3/29/83).

Not only did the State's Attorney personally degrade the judge, but he also tampered with the integrity of the justice system by suggesting to the community that it was a proper function of the court to help the State's Attorney "get" a defendant. This suggestion was in addition to the State's Attorney continually and publicly depicting this defendant as a person not worthy of fair treatment by the justice system.

The State made not the slightest attempt to refute or defend the numerous acts of misconduct; it conceded them. To avoid the distasteful task of justifying and defending the misconduct by the State's Attorney, the State summarily concluded that the defendant failed to prove actual and substantial prejudice. The State further concludes that the trial court should have used the remedies of continuance or change of venue. Both conclusions ignore the nature and extent of the misconduct by the State's Attorney and its impact on the proceedings.

The Appellate Court misconstrued the nature of the due process to which the defendant was entitled. The court apparently accepted the contention of the State that due process violations must be articulated by evidence of independent violations of *other* specific constitutional rights, such as the right to an impartial jury or the right to counsel. This contention is incorrect. In *People v. Cornille,* 95 Ill.2d 497, 448 N.E.2d 857, 69 Ill.Dec. 945, 951 (1983), the Illinois Supreme Court stated:

> To establish a violation of due process the defendant must demonstrate that some action of the State was inconsistent "with the fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions," and which reflect "the community sense of fair play and decency." (Citations omitted).

After examining the totality of facts in this case, the trial court correctly found that the misconduct of the State's Attorney was so pervasive and continuing that it fatally infected the very fundamental fairness of the proceedings and found that the State had denied this defendant due process by acts of misconduct directed at each participant in the proceedings and every facet of the criminal justice system.

The overall level of contamination in the prosecution of this defendant, recognized and commented upon by the Appellate Court, surely is inconsistent with the reasonable definition of due process set forth in *People v. Cornille,* 95 Ill.2d 497, 448 N.E.2d 857, 69 Ill.Dec. 945, 952 (1983), regardless of whether any single act of misconduct by the prosecutor was itself a violation of due process. If this court considers the cumulative effect of the misconduct of the State on the entire proceedings, then it should conclude that there has been irreparable injury to the defendant's individual right to due process and to the right of the public to a fair and decent trial of the accused.

II.

Dismissal Is An Appropriate Remedy For Such Prosecutorial Misconduct

In *U. S. v. Morrison,* 449 U.S. 361, 66 L.Ed.2d 564, 101 S.Ct. 665 (1981), this court held that absent a showing of prejudice, or a substantial threat thereof, dismissal was an inappropriate remedy where the violation of the Sixth Amendment right to counsel had no adverse impact on the proceedings. This court noted, however, that there was no claim of continuing prejudice, nor any record of a pattern of recurring violations that might warrant the imposition of a more extensive remedy in order to deter further lawlessness. (See *Morrison,* above at Page 569). The conduct cited in *Morrison* involved the private meeting of DEA agents with the defendant without the knowledge or permission of counsel and the private disparagement of counsel by the agents.

In *U. S. v. Morrison,* (above at Pages 568, 569, 570), this court indicated that not only actual prejudice, but also the substantial threat of prejudice, must be considered in determining the proper remedy for misconduct. In evaluating the misconduct, the court examined its impact on the proceedings.

In *U. S. v. Armijo-Martinez,* 669 F.2d 1131 (6th Cir. 1982), the court affirmed a dismissal for prosecutorial misconduct and defined the defendant's burden of proof of prejudice to be a "very low threshold." (See Page 1137). In *U. S. v. Gouveia,* 704 F.2d 1116 (9th Cir. 1983), the court recognized the difficulty of providing prejudice and held that prejudice could be presumed from the circumstances. (See Page 1126).

All of these cases use a similar analysis. The court first makes a determination of prejudice, and then the court tailors a remedy consistent with balancing the interests of society in the effective administration of justice and the defendant's fundamental rights. (See *Morrison* at Page 568).

This trial court expressly found a denial of due process, serious impairment of right to counsel, violation of fundamental fairness, and the existence of actual and substantial prejudice to the defendant (C165, 166). The trial court further determined that the prejudice to the defendant far outweighed the competing interests of society (C165, 166). These findings and determinations by the trial court are supported by the evidence and are consistent with the due process principle of fundamental fairness:

> Every person interested in any matter in litigation in any court not only has the right to fair and impartial treatment in such court, but is also entitled to be so dealt with, and to have the court and the officers of the court so dealt with, that he may not have cause to feel or to believe that an unjust decision was compelled or obtained by the unlawful conduct of another. (*People v. Gilbert,* 281 Ill. 619, 630 (1917)).

It would have been impossible for this defendant to have felt he had received fair and impartial treatment. At any point he could reasonably have feared that the court or even his counsel would buckle under the constant pressure of the repeated attacks and threats from the State's Attorney. No assurance to the contrary would have been satisfactory.

The holding in *Morrison,* based upon misconduct which essentially consisted of a private meeting between the defendant and DEA agents in which the agents disparaged defense counsel, was therefore erroneously applied by the Appellate Court to bar dismissal in this case which involved pervasive and continual prosecutorial misconduct.

The Appellate Court also failed to consider that in *Morrison,* this court indicated that not only actual prejudice, but also the substantial *threat* of prejudice, must be considered in determining the proper remedy for misconduct. *Morrison,* 66 L.Ed.2d 564 at 568, 569, 570. Further, the court in *Morrison* cautioned that it did not have before it a fact situation with a pattern of recurring violations and specifically suggested that such a pattern might warrant a more extreme remedy than suppression in order to deter future misconduct. A clear and continuing pattern of recurring violations was demonstrated by the defendant in this case and has been acknowledged by the Appellate Court in its opinion. Thus under *Morrison,* dismissal was necessary, and the Appellate Court was simply wrong in citing *Morrison* for authority that the remedy of suppressing one statement by the defendant was adequate to redress the denial of his rights.

The pattern of lawlessness by the Madison County State's Attorney in this case could only be deterred by a dismissal. There can be no doubt from the history of misconduct by the State's Attorney, commencing two years prior to indictment and leading up to the eve of the final hearing, that no other remedy would deter him. In every instance in which his overzealous conduct was called to task, he only renewed and escalated his

tactics. The code of ethics, the disciplinary rules, ethical considerations, and the admonishments and rulings of the court did not deter this State's Attorney. He was determined to "get" the defendant, regardless of the consequences to the administration of justice. Attilla the Hun, who sacked western civilization to achieve his ends, is the self-declared model for this State's Attorney. (Defendant's Exhibit No. 1, 11/7/80). There can be no innocent construction of his conduct.

Furthermore, the State's Attorney offered no apologies for his conduct. Rather, he publicly declared that the ends justify the means, by saying, "It takes clever police tactics to catch clever criminals." He gratuitously admitted his "sneaky" tactics and declared that criticism was to be considered a sign of his good efforts. In view of his expressed attitude, the remedies suggested by the State and accepted by the Appellate Court are futile and useless.

The Appellate Court also misapprehended the applicability of *U. S. v. Stanford,* 589 F.2d 285 (7th Cir. 1978). In the *Stanford* case, the court specifically stated, "We are not persuaded that the publicity here was so egregious that it would taint a fairly conducted bench trial." *U. S. v. Stanford,* 589 F.2d 285, 299 (7th Cir. 1978). In the instant case, however, the Appellate Court itself characterized the State's conduct as "unjustified," "inappropriate," and "reprehensible." *U. S. v. Stanford* does not, therefore, state a principle that bars dismissal in this case, particularly in view of the specific findings of the trial court and the Appellate Court. The conduct of the State in this case was indeed egregious.

CONCLUSION

For the foregoing reasons, the petitioner urges this court to grant this petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

ILLINOIS SUPREME COURT

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Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 2, 1984

Mr. J. William Lucco
Mudge, Riley and Lucco
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No. 60148 — People State of Illinois, respondent, vs. James Barton, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Clerk of the Appellate Court on October 23, 1984.

APPENDIX B

No. 83-386

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS

Plaintiff-Appellant,

v.

JAMES BARTON,

Defendant-Appellee

Appeal from the Circuit Court of Madison County

Honorable Edward Ferguson, Judge Presiding

Mr. JUSTICE KASSERMAN delivered the opinion of the court:

An indictment charging defendant, James Barton, with two counts of bribery, one count of conspiracy to commit bribery, and one count of official misconduct was returned by the grand jury of Madison County. On motion of defendant, the trial court entered an order dismissing the indictment because of prosecutorial misconduct. The State appeals.

The charges against defendant were based on allegations that defendant, in his capacity as Madison County Supervisor of Assessments, had accepted $1,000 from William Nichols and gave $500 of the money to Walter Greathouse, a member of the Madison County Zoning Board of Appeals, in order to obtain Greathouse's approval of a special use permit requested by Mr. Nichols.

Defendant filed a pre-trial motion requesting suppression of statements made by him on November 5, 1982, to an assistant State's Attorney and an Illinois Division of Criminal Investigation agent. The motion alleged that defendant had been denied his constitutional right to counsel. The trial court granted defendant's motion and entered an order suppressing the statements made by defendant.

Subsequently, defendant filed an amended motion to dismiss the indictment alleging, *inter alia,* that misconduct on the part of the Madison County State's Attorney had deprived him of due process of law. At the hearing on the motion to dismiss, Marvin Darling, a former administrative assistant of the Madison County State's Attorney, Don W. Weber, testified that in May 1981, Mr. Weber stated that he would get defendant. The parties subsequently stipulated to the introduction of the following evidence and exhibits into evidence:

Mr. Weber was elected State's Attorney of Madison County on November 4, 1980, and, a few days later, declared that the public wanted a prosecutor like "Attilla the Hun." Mr. Weber also pledged to investigate defendant.

On March 30, 1981, after a grand jury had failed to return an indictment against defendant for making improper property assessments, Mr. Weber publicly commented that "[t]here may not be criminal activity * * *, but there might be grounds for dismissal or other disciplinary action." On May 15, 1981, Mr. Weber stated that he would comply with a recommendation made in the grand jury report that he release to the Madison County board a report made by the Illinois Division of Criminal Investigation concerning defendant's activities in office.

On November 12, 1982, the newspaper media became aware of the fact that a new grand jury investigation of defendant was being conducted. That same day, defendant gave an interview to a newspaper reporter who had learned of the grand jury investigation. On November 16, 1982, Mr. Weber publicly an-

nounced that he would ask the grand jury to indict defendant for conspiracy to commit bribery and stated that William Nichols had told investigators that he gave defendant money for the purpose of influencing a zoning board of appeals decision. The next day, further comments from the State's Attorney were published concerning defendant's case.

On November 18, 1982, Mr. Weber told reporters that the indictment he sought against defendant for conspiracy to commit bribery was "not an iffy case." The State's attorney commented to the press about the testimony of William Nichols and stated that defendant "never was cleared of impropriety despite the finding of insufficient evidence" by the 1981 grand jury. On November 19, 1982, the State's Attorney suggested publicly that defendant was a "corrupt official." A few days later, defendant proclaimed his innocence in a newspaper interview. On November 24, 1982, there were a number of newspaper articles concerning Illinois Division of Criminal Investigation inquiries regarding defendant's alleged involvement in the bribery scheme.

On December 1, 1982, Mr. Weber again publicly urged that defendant be fired as Madison County Supervisor of Assessments. The following day, Mr. Weber urged that the defendant be "canned" prior to trial. When a reporter asked whether defendant should be considered innocent prior to trial, Mr. Weber replied that "[p]eople just don't understand the law." On December 6, 1982, a newspaper acknowledged that defendant's statements which were later suppressed were included in the discovery materials made available to the press by the prosecution. On December 16, 1982, Mr. Weber announced to the press his frustration with the Madison County board's failure to fire defendant and said that he would seek an additional indictment against defendant for official misconduct. A day later, while commenting on the additional charge being sought against defendant, the State's Attorney said, "I want to make sure that I get him."

In early January 1983, Mr. Weber mailed a packet of material to the Madison County board. The material sent included Illinois Department of Crin.inal Investigation reports, a memorandum concerning dismissal procedures, and polygraph results suggesting deception on the part of Walter Greathouse. The incident and a description of the items mailed were reported in the newspaper.

On February 18, 1983, Mr. Weber was present at a public meeting attended by approximately 150 people. At this meeting Mr. Weber made the following remarks:

(1) "The more people we get involved in the Barton investigation, the more we can get them worked up."

(2) "Barton is presumed to be innocent and I do not want to prejudice his trial."

(3) "I told you a year and a half ago how I felt about this whole situation."

(4) "Barton is just like that school teacher, Van Hook [who had been recently convicted of taking indecent liberties with a child.]"

(5) "Barton's trial is my number one priority along with the Prante case, now that Van Hook's case is over with."

On March 8, 1983, the personnel committee of the Madison County board held a closed meeting concerning defendant. At this meeting, Assistant State's Attorney Keith Jensen addressed the committee. Mr. Jensen said that defendant was "telling the police one thing and turning around in front of the newspapers, he's a chameleon. He's innocent of anything. He wants his trial, he wants to hide behind the Fifth Amendment, he wants all the advantages he can, but he is conveying a different impression to those people than he is to you people." Following this meeting, Mr. Weber told reporters that the Madison County board should fire defendant.

On March 12, 1983, a benefit dance was sponsored by the Illinois Division of Criminal Investigation. About 300 persons attended. During the dance, the State's Attorney made unspecified comments concerning defendant over the public address system. The comments were made in the context of a contest conducted by the State's Attorney to determine by crowd applause which statements made by public officials and recently convicted defendants should receive an award for the "dumbest statement" of the year.

On March 17, 1983, the State's Attorney publicly criticized the members of the Madison County board for not firing defendant. Mr. Weber reiterated that defendant was his number one priority and again compared defendant to Van Hook, the man recently convicted of indecent liberties with a child.

On March 22, 1983, defendant's motion to suppress the statements he made on November 5, 1982, was heard. On March 25, 1983, Mr. Weber told the press that he had removed himself as prosecutor of defendant's case and suggested that defense counsel was attacking him as a "typical defense tactic." After the trial court entered an order on March 29, 1983, suppressing defendant's statements, the State's Attorney publicly derided the trial judge, stating that the judge was "not now, nor has he ever been a friend to the prosecution. Needless to say, he is not my favorite judge."

In an April 6, 1983, newspaper article, the State's Attorney was reported to have defended the tactics used to obtain defendant's statement and stated that "clever criminals require clever tactics to catch them." The next day, an amended motion to strike defendant's motion to dismiss was delivered to defense counsel by an assistant State's Attorney. Defense counsel was informed that the amended motion to strike, which alleged numerous violations of the Code of Professional Responsibility for lawyers (87 Ill.2d R. 1-101 *et seq.*) on the part of defendant's attorney, would be filed in the trial court if the defendant's attorney proceeded to a hearing on the motion to dismiss.

On May 11, 1983, the trial court issued an order dismissing all counts against defendant on the grounds of prosecutorial misconduct. The trial court's order concluded that defendant had been denied due process, that defendant's right to counsel of his choice had been seriously impaired, that fundamental fairness had been violated, and that the entire course of the prosecutor's conduct had caused actual and substantial prejudice to defendant. The State has perfected this appeal in which we are asked to review the propriety of the trial court's dismissal of the indictment.

In the order of dismissal, the trial court did not specify what due process right or rights it felt had been violated. We agree with the State, however, that two due process grounds appear applicable: (1) prejudicial pretrial publicity generated by the State's Attorney; and (2) denial of defendant's right to counsel.

As defendant correctly notes, the trial court has the inherent authority to dismiss an indictment where there has been a clear denial of due process. (*People v. Lawson* (1977), 67 Ill.2d 449, 455-56, 367 N.E.2d 1244, 1246.) It is also true, however, that this power should be utilized with restraint and a due process violation will warrant dismissal of an indictment only if the violation is clear and can be ascertained with certainty. (*People v. Lawson* (1977), 67 Ill.2d 449, 456-57, 367 N.E.2d 1244, 1247; *People v. Schroeder* (2d Dist. 1981), 102 Ill.App.3d 133, 135-36, 429 N.E.2d 573, 576.) To support a dismissal of a criminal charge because of prosecutorial misconduct, the alleged misconduct must result in actual and substantial prejudice to a defendant. (*People v. Lawson; People v. Mack* (4th Dist. 1982), 107 Ill.App.3d 164, 171, 437 N.E.2d 396, 402.) Applying this standard to the case at bar, we find that the prosecutor's conduct in the instant case does not require a dismissal of defendant's indictment.

Although there was ample evidence of potentially adverse publicity, such proof alone does not necessarily establish pre-

judice since a defendant can receive a fair trial by impartial jurors despite harmful publicity. (*People v. Torres* (1973), 54 Ill.2d 384, 389, 297 N.E.2d 142, 145; *United States v. Stanford* (7th Cir. 1978), 589 F.2d 285, 298-99.) In *Stanford,* a case dealing with a similar due process contention regarding adverse publicity, the court observed that there are more traditional procedures for avoiding prejudice due to adverse publicity. These procedures include the *voir dire* process, a motion for a continuance and a motion for a change of venue. (*United States v. Stanford* (7th Cir. 1978), 589 F.2d 285, 299.) In the case at bar, defendant failed to pursue any of these avenues of relief. Defendant made no motion for a change of venue nor did he move for a continuance. Further, the trial court dismissed the indictment prior to trial where the *voir dire* examination of prospective jurors would have been conducted. In doing so, the trial court could not have determined whether any actual prejudice to the defense resulted from adverse publicity generated by the prosecution. *United States v. Stanford.*

Additionally, we note that the trial court has the statutory power to appoint a special prosecutor whenever a prosecutor "is interested in any cause or proceeding" (Ill. Rev. Stat. 1981, ch. 14, par. 6). In the present case, the trial court's concern about the conduct of the State's Attorney could have been eliminated by the appointment of a special prosecutor with no personal interest in defendant's case.

In view of the evidence and the availability of procedures to offset prejudice due to adverse publicity, we conclude that the trial court's dismissal of defendant's indictment was erroneous. The trial court's conclusion that actual and substantial prejudice to defendant resulted from the publicity was speculative and did not justify punishing society for the misconduct of a prosecutor. See *United States v. Stanford* (7th Cir. 1978), 589 F.2d 285, 299.

The alternative due process ground for dismissal, the denial of defendant's right to counsel at the November 5, 1982, inter-

view, is also not a compelling reason to dismiss the defendant's indictment in the case at bar. The proper remedy for infringement of the right to counsel is suppression of the evidence obtained in violation of that right, not dismissal. (*United States v. Morrison* (1981), 449 U.S. 361 366, 66 L.Ed.2d 564, ____, 101 S.Ct. 665, 668; *People v. Amft* (1st Dist. 1982), 109 Ill.App.3d 619, 624, 440 N.E.2d 924, 928.) Since the statement allegedly illegally obtained from defendant were in fact suppressed, defendant has failed to demonstrate prejudice as a result of prosecutorial misconduct in denying defendant the right to counsel.

Although we have determined that there was insufficient proof that the conduct of the State's Attorney resulted in the denial of due process so as to warrant a dismissal of criminal proceedings in the instant case, we emphasize that we do not condone the prosecutor's behavior. The actions of Mr. Weber in this proceedings were wholly unjustified and inappropriate. While we applaud the vigorous prosecution of crime, we are appalled when, as here, a prosecutor becomes a persecutor. If the conduct of a prosecutor is the result of any motive other than the fair and impartial prosecution of alleged crimes, such conduct must not be tolerated by a court.

The conduct of the prosecutor in the case at bar was, to say the least, reprehensible. The question of the sanctions to be applied as punishment for such conduct and to ensure that it is not repeated is not before this court. However, the interest of the public in the impartial prosecution of alleged crimes dictates that this cause be reversed and remanded to the trial court for further proceedings free of acrimony and apparent vendetta that characterized the proceedings which prompted the trial court to dismiss the indictment.

For the foregoing reasons, the judgment of the circuit court of Madison County is reversed and this cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

JONES and KARNS, JJ., CONCUR.

(3)

No. 84-972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES BARTON,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fifth Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether dismissal of an indictment based on a claim of prosecutorial misconduct is required where petitioner has not demonstrated any degree of prejudice resulting therefrom.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW ...	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	3
CONCLUSION	6

TABLE OF AUTHORITIES

Cases	PAGE
Application of National Broadcasting Co., 635 F.2d 945 (2d Cir. 1980)	5
Beck v. Washington, 369 U.S. 541 (1962)	5
United States v. Armijo-Martinez, 459 U.S. 810 (1982)	4
United States v. Armijo-Martinez, 669 F.2d 1131 (6th Cir. 1982)	4
United States v. Gouveia, 704 F.2d 1116 (9th Cir. 1983)	4
United States v. Gouveia, ____ U.S. ____, 104 S.Ct. 2292 (1984)	5
United States v. Lamoureux, 711 F.2d 745 (6th Cir. 1983)	3
United States v. Morrison, 449 U.S. 361 (1981)	4
United States v. Smith, 687 F.2d 147 (6th Cir. 1982)	3, 4
United States v. Stanford, 589 F.2d 285 (7th Cir. 1978)	5
United States v. Valenzuela-Pernal, 458 U.S. 858 (1982)	4

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Appellate Court, Fifth District, is reported at *People v. Barton*, 122 Ill. App. 3d 1079, 462 N.E.2d 538 (5th Dist. 1984). The opinion has been submitted to this Court as an Appendix to the Petition for Writ of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Petitioner, James Barton, was indicted by the Madison County, Illinois, grand jury on two counts of bribery, one count of conspiracy to commit bribery, and one count of official misconduct. The circuit court, on petitioner's motion, dismissed the indictment because of prosecutorial misconduct.

The respondent appealed from the dismissal of the indictment. The Illinois Appellate Court, Fifth District, reversed the judgment of the circuit court and remanded the cause for further proceedings. *People v. Barton*, 122 Ill. App. 3d 1079, 462 N.E.2d 538 (5th Dist. 1984).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the Illinois Appellate Court, Fifth District, insofar as petitioner does not raise a question of constitutional proportion that is worthy of review. In seeking a writ of certiorari petitioner advances the claims 1) whether prosecutorial misconduct can violate due process even if it does not directly affect the evidence, and 2) whether dismissal of an indictment is an appropriate remedy for such prosecutorial misconduct. Respondent maintains further review of this cause is unnecessary in that the decision below does not depart from established federal precedent. Dismissal of an indictment based on a claim of prosecutorial misconduct is not required where petitioner has not demonstrated any degree of prejudice resulting therefrom. The appellate court fully considered and correctly decided the issue. Respondent further maintains it would not be prudent for this Court to grant certiorari on an issue of limited impact for future litigants.

Petitioner, by way of this petition, claims that he was denied due process of law by the conduct of the Madison County State's Attorney. As a result of the misconduct, petitioner contends that the remedy is the dismissal of the indictment against the petitioner. The respondent submits that petitioner's position is not supported by case authority. Indictments can only be dismissed upon a showing of "demonstrated and longstanding prosecutorial misconduct" as well as a showing of prejudice to the defendant. *United States v. Lamoureux*, 711 F.2d 745, 747 (6th Cir. 1983); *United States v. Smith*, 687 F.2d 147, 153 (6th

Cir. 1982). Prejudice of sufficient magnitude to justify dismissing an indictment must have or threaten "some adverse effect upon the effectiveness of counsel's representation or [produce] some other prejudice to the defense." *United States v. Morrison*, 449 U.S. 361, 365 (1981).

Petitioner's reliance on *United States v. Armijo-Martinez*, 669 F.2d 1131 (6th Cir. 1982), is clearly misplaced. (Petition for Writ at 17) In *Armijo-Martinez*, the question presented was whether the Government may, by its unilateral action, make material witnesses in a criminal prosecution unavailable to the defendant. The court held that the sixth amendment compulsory process rights of the defendants, who were charged with transporting eighteen illegal aliens, were violated when the Government offered fourteen of the aliens voluntary departure and paid the expenses of their return to Mexico before counsel for the defendants had an opportunity to interview them. Because the defendants' right to compulsory process had been violated, dismissal of the indictments was required where the defendants were able to demonstrate a very low threshold of prejudice. The respondent submits the decision in *Armijo-Martinez* lacks any precedential value on the standard of prejudice in that the judgment was vacated and remanded by this Court in *United States v. Armijo-Martinez*, 459 U.S. 810 (1982), for further consideration in light of *United States v. Valenzuela-Pernal*, 458 U.S. 858 (1982).

Petitioner's further reliance on *United States v. Gouveia*, 704 F.2d 1116 (9th Cir. 1983), is also misplaced. (Petition for Writ at 17) In *Gouveia*, the court held that federal prison inmates who were in isolation for periods ranging from eight to twenty months on suspicion of murder, and who were denied appointment of counsel during that period, were entitled to dismissal of the indictments.

However, this Court in *United States v. Gouveia*, ____ U.S. ____, ____, 104 S.Ct. 2292, 2299 (1984), reversed the judgment of the lower court and held that the concerns of the court of appeals "while certainly legitimate ones, are simply not concerns implicating the right to counsel and we reaffirm that the mere 'possibility of prejudice [to a defendant resulting from the passage of time] . . . is not itself sufficient reason to wrench the Sixth Amendment from its proper context.' "

Petitioner in the case at bar seeks to have this Court articulate a standard for the dismissal of an indictment which rejects the requirement of prejudice. In light of the positions most recently taken by this Court in *United States v. Armijo-Martinez* and *United States v. Gouveia*, petitioner's claim has been implicitly rejected.

With respect to petitioner's claim as to the propriety of dismissal of the indictment due to pretrial publicity, respondent maintains that the extreme remedy of dismissal of an indictment before a *voir dire* is not warranted. Courts have emphasized the efficacy of *voir dire* in cases, *Abscam* and *Watergate*, involving far more extensive publicity than occurred here. *Application of National Broadcasting Co.*, 635 F.2d 945, 953 (2d Cir. 1980). If a *voir dire* should reveal that the publicity had created a taint, a remedy such as a change of venue would be more appropriate than dismissal. In the absence of any evidence indicating that petitioner has been prejudiced by the publicity in this case, dismissal of the indictment is not an appropriate remedy. *Beck v. Washington*, 369 U.S. 541 (1962). Petitioner is not entitled to permanent immunity from prosecution respecting his alleged criminal conduct.

In *United States v. Stanford*, 589 F.2d 285 (7th Cir. 1978), while defendants claimed prosecutorial misconduct in that the United States Attorney allegedly intentional-

ly generated prejudicial pretrial publicity, defendants failed to show prejudice resulting therefrom. Consequently, the court held dismissal of the indictments was not required. In the case at bar, the Illinois appellate court fully considered the facts in view of *United States v. Stanford* and Illinois decisional law. Based upon federal and state court precedent, the appellate court held that there was insufficient proof that the conduct of the Madison County State's Attorney resulted in the denial of due process so as to warrant a pretrial dismissal of the criminal proceedings.

CONCLUSION

In view of the foregoing reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

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